

No. 12-55587

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL SEGAL

Plaintiffs-Appellant,

v.

ROGUE PICTURES, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. 2:10-CV-05650 DSF (AJWx) (Hon. Dale S. Fischer)

SUPPLEMENTAL EXCERPTS OF RECORD

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Gail Migdal Title (SBN 49023)

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PRODUCTIONS, PHANTOM FOUR FILMS, DAVID S. GOYER,
AND JESSIKA BORSICZKY

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1 2 3 4 5 6 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10
11 DANIEL SEGAL, } Case No. CV 10-5650 DSF (FFMx)
12 Plaintiff, }
13 v. } STANDING ORDER
14 } FOR CASES ASSIGNED TO
15 ROGUE PICTURES, et al., } JUDGE DALE S. FISCHER
16 Defendants. }
17

19 **READ THIS ORDER CAREFULLY. IT CONTROLS THIS CASE**
20 **AND DIFFERS IN SOME RESPECTS FROM THE LOCAL RULES.**
21 COUNSEL FOR PLAINTIFF SHALL IMMEDIATELY SERVE THIS
22 ORDER ON ALL PARTIES, INCLUDING ANY NEW PARTIES TO THE
23 ACTION. IF THIS CASE WAS REMOVED FROM STATE COURT, THE
24 DEFENDANT WHO REMOVED THE CASE SHALL SERVE THIS ORDER ON
25 ALL OTHER PARTIES.

26 This case has been assigned to the calendar of Judge Dale S. Fischer.

27 Both the Court and counsel bear responsibility for the progress of litigation in
28 federal court. To “secure the just, speedy, and inexpensive determination” of this

revised 11/12/08

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1 earliest possible time before the date scheduled for the motion or conference to seek
2 the Court's permission to appear by telephone and to make the necessary
3 arrangements. The Court may choose instead to continue the hearing.

4 **11. Ex Parte Applications**

5 Ex parte applications are solely for extraordinary relief and are rarely justified.
6 See *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F. Supp. 488
7 (C.D. Cal. 1995). Applications that fail to conform to Local Rules 7-19 and 7-19.1,
8 including a statement of opposing counsel's position, will not be considered. In
9 addition to the requirements of Local Rules 7-19 and 7-19.1, the moving party shall
10 electronically serve the opposing party, if permitted, and shall also advise by
11 telephone that such service has been made. Moving party shall also notify the
12 opposition that opposing papers must be filed no later than twenty-four hours (or one
13 court day) following such facsimile or personal service. If opposing counsel does not
14 intend to oppose the ex parte application, counsel must advise the courtroom deputy
15 clerk by telephone. A conformed Chambers copy of moving, opposition, or notice of
16 non-opposition papers must be hand-delivered to the box outside the entrance to
17 Judge Fischer's Chambers. The Court considers ex parte applications on the papers
18 and usually does not set these matters for hearing. The courtroom deputy clerk will
19 notify counsel of the Court's ruling or a hearing date and time, if the Court
20 determines a hearing is necessary. Sanctions may be imposed for misuse of ex parte
21 applications.

22 **12. Applications or Stipulations to Extend the Time to File any Required**
23 **Document or to Continue any Date**

24 No stipulation extending the time to file any required document or to continue
25 any date is effective until and unless the Court approves it, or unless the Federal
26 Rules of Civil Procedure provide for an automatic extension. Both applications and
27 stipulations must set forth:

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1 Guidelines (which can be found on the Court's website under "Attorney
2 Information> Attorney Admissions"). Counsel are expected to adhere to this
3 standard of conduct. Counsel are required to advise their clients of the terms of this
4 Order.

5 **CAVEAT: IF COUNSEL FAIL TO FILE THE REQUIRED JOINT**
6 **RULE 26(f) REPORT, OR THE REQUIRED PRETRIAL DOCUMENTS, OR**
7 **IF COUNSEL FAIL TO APPEAR AT THE SCHEDULING CONFERENCE,**
8 **THE PRETRIAL CONFERENCE, OR ANY OTHER PROCEEDING**
9 **SCHEDULED BY THE COURT, AND SUCH FAILURE IS NOT**
10 **SATISFACTORILY EXPLAINED TO THE COURT: (1) THE CAUSE SHALL**
11 **BE DISMISSED FOR FAILURE TO PROSECUTE, IF SUCH FAILURE**
12 **OCCURS ON THE PART OF THE PLAINTIFF, (2) DEFAULT (AND**
13 **THEREAFTER DEFAULT JUDGMENT) SHALL BE ENTERED IF SUCH**
14 **FAILURE OCCURS ON THE PART OF THE DEFENDANT, OR (3) THE**
15 **COURT MAY TAKE SUCH ACTION AS IT DEEMS APPROPRIATE.**

17
18 Dated: 8/2/10

19 
20 DALE S. FISCHER
United States District Judge

B

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8 of Relativity Media, LLC, UNIVERSAL STUDIOS
9 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
10 HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER
and JESSIKA BORSICZKY GOYER

14 DANIEL SEGAL, an individual, } Case No. CV10 5650 DSF (FFMx)
15 Plaintiff. } [Hon. Dale S. Fischer]

16 | vs. | DAVID S. GOYER'S ANSWER TO
17 | ROGUE PICTURES, a business entity. | FIRST AMENDED COMPLAINT

17 ROGUE PICTURES, a business entity,
18 form unknown, UNIVERSAL STUDIOS
19 HOME ENTERTAINMENT LLC, a
20 California limited liability company,
21 UNIVERSAL STUDIOS HOME
22 ENTERTAINMENT PRODUCTIONS
23 LLC, a California limited liability
24 company, PLATINUM DUNES
25 PRODUCTIONS, a California
corporation, PHANTOM FOUR FILMS,
a California corporation, DAVID S.
GOYER, an individual, MICHAEL
BAY, an individual, ANDREW FORM,
an individual, BRAD FULLER, an
individual, JESSIKA BORSICZKY
GOYER, an individual, WILLIAM
BEASLEY, an individual, and DOES 1-
50, inclusive.

Defendants.

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ANSWER

Defendant David S. Goyer (“Answering Defendant”), through counsel, answers the First Amended Complaint (“FAC”) filed by Plaintiff Daniel Segal (“Plaintiff”), as follows:

INTRODUCTION

1. In answering paragraph 1 of the FAC, Answering Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies each and every allegation set forth therein.

JURISDICTION AND VENUE

2. In answering paragraph 2 of the FAC, Answering Defendant admits that the FAC alleges causes of action that purport to arise under the Copyright Laws of the United States and the common law of the State of California.

3. In answering paragraph 3 of the FAC, Answering Defendant admits upon information and belief that this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

4. In answering paragraph 4 of the FAC, Answering Defendant admits upon information and belief that venue is proper in this Court.

PARTIES

5. In answering paragraph 5 of the FAC, Answering Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies each and every allegation set forth therein.

6. In answering paragraph 6 of the FAC, Answering Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies each and every allegation set forth therein.

7. In answering paragraph 7 of the FAC, Answering Defendant lacks sufficient information to admit or deny the allegations in this paragraph and on that basis denies each and every allegation set forth therein.

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1 8. In answering paragraph 8 of the FAC, Answering Defendant lacks
 2 sufficient information to admit or deny the allegations in this paragraph and on that
 3 basis denies each and every allegation set forth therein.

4 9. In answering paragraph 9 of the FAC, Answering Defendant admits that
 5 Phantom Four Films is a California corporation that transacts business in Los Angeles
 6 County, California.

7 10. In answering paragraph 10 of the FAC, Answering Defendant admits that
 8 he is the director and writer of the film *The Unborn*. Answering Defendant further
 9 admits that he is an individual residing in Los Angeles County, California.

10 11. In answering paragraph 11 of the FAC, Answering Defendant admits that
 11 Andrew Form is a co-producer of the film *The Unborn*. Answering Defendant lacks
 12 sufficient information to admit or deny the remaining allegations set forth in
 13 paragraph 11 and on that basis denies them.

14 12. In answering paragraph 12 of the FAC, Answering Defendant admits that
 15 Michael Bay is a co-producer of the film *The Unborn*. Answering Defendant lacks
 16 sufficient information to admit or deny the remaining allegations set forth in
 17 paragraph 12 and on that basis denies them.

18 13. In answering paragraph 13 of the FAC, Answering Defendant admits
 19 that Brad Fuller is a co-producer of the film *The Unborn*. Answering Defendant lacks
 20 sufficient information to admit or deny the remaining allegations set forth in
 21 paragraph 13 and on that basis denies them.

22 14. In answering paragraph 14 of the FAC, Answering Defendant admits that
 23 Jessika Borsiczky Goyer is credited as a co-executive producer of the film *The*
 24 *Unborn*. Answering Defendant lacks sufficient information to admit or deny the
 25 remaining allegations set forth in paragraph 14 and on that basis denies them.

26 15. In answering paragraph 15 of the FAC, Answering Defendant admits that
 27 William Beasley is credited as a co-executive producer of the film *The Unborn*.

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1 Answering Defendant lacks sufficient information to admit or deny the remaining
 2 allegations set forth in paragraph 15 and on that basis denies them.

3 16. In answering paragraph 16 of the FAC, Answering Defendant lacks
 4 sufficient information to admit or deny the allegations in this paragraph and on that
 5 basis denies each and every allegation set forth therein.

6 17. In answering paragraph 17 of the FAC, Answering Defendant denies
 7 each and every allegation set forth therein.

8 **THE PROTECTED WORK**

9 18. In answering paragraph 18 of the FAC, Answering Defendant lacks
 10 sufficient information to admit or deny the allegations in this paragraph and on that
 11 basis denies each and every allegation set forth therein.

12 19. In answering paragraph 19 of the FAC, Answering Defendant lacks
 13 sufficient information to admit or deny the allegations in this paragraph and on that
 14 basis denies each and every allegation set forth therein.

15 20. In answering paragraph 20 of the FAC, Answering Defendant lacks
 16 sufficient information to admit or deny the allegations in this paragraph and on that
 17 basis denies each and every allegation set forth therein.

18 21. In answering paragraph 21 of the FAC, Answering Defendant lacks
 19 sufficient information to admit or deny the allegations in this paragraph and on that
 20 basis denies each and every allegation set forth therein.

21 22. In answering paragraph 22 of the FAC, Answering Defendant lacks
 22 sufficient information to admit or deny the allegations in this paragraph and on that
 23 basis denies each and every allegation set forth therein.

24 23. In answering paragraph 23 of the FAC, Answering Defendant lacks
 25 sufficient information to admit or deny the allegations in this paragraph and on that
 26 basis denies each and every allegation set forth therein.

27 ///

28 ///

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1 24. In answering paragraph 24 of the FAC, Answering Defendant lacks
 2 sufficient information to admit or deny the allegations in this paragraph and on that
 3 basis denies each and every allegation set forth therein.

4 DEFENDANTS' INFRINGEMENT OF PLAINTIFF'S SCREENPLAY

5 25. In answering paragraph 25 of the FAC, Answering Defendant lacks
 6 sufficient information to admit or deny the allegations in this paragraph and on that
 7 basis denies each and every allegation set forth therein.

8 26. In answering paragraph 26 of the FAC, Answering Defendant lacks
 9 sufficient information to admit or deny the allegations in this paragraph and on that
 10 basis denies each and every allegation set forth therein.

11 27. In answering paragraph 27 of the FAC, Answering Defendant lacks
 12 sufficient information to admit or deny the allegations in this paragraph and on that
 13 basis denies each and every allegation set forth therein.

14 28. In answering paragraph 28 of the FAC, Answering Defendant lacks
 15 sufficient information to admit or deny the allegations in this paragraph and on that
 16 basis denies each and every allegation set forth therein.

17 29. In answering paragraph 29 of the FAC, Answering Defendant lacks
 18 sufficient information to admit or deny the allegations in this paragraph and on that
 19 basis denies each and every allegation set forth therein.

20 30. In answering paragraph 30 of the FAC, Answering Defendant lacks
 21 sufficient information to admit or deny the allegations in this paragraph and on that
 22 basis denies each and every allegation set forth therein.

23 31. In answering paragraph 31 of the FAC, Answering Defendant lacks
 24 sufficient information to admit or deny the allegations in this paragraph and on that
 25 basis denies each and every allegation set forth therein.

26 32. In answering paragraph 32 of the FAC, Answering Defendant lacks
 27 sufficient information to admit or deny the allegations in this paragraph and on that
 28 basis denies each and every allegation set forth therein. Further, Answering

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1 Defendant denies that the film *The Unborn* is substantially similar to Plaintiff's
2 Screenplay and further denies that he or anyone associated with *The Unborn* copied
3 from Plaintiff's Screenplay.

4 33. In answering paragraph 33 of the FAC, Answering Defendant admits that
5 he contributed to the screenplays for *Batman Begins*, *The Dark Knight*, and *The Flash*
6 (unproduced). Answering Defendant lacks sufficient information to admit or deny the
7 remaining allegations in this paragraph and on that basis denies each and every
8 allegation set forth therein, except denies the allegations that he has had a long-
9 standing relationship with Mosaic Media, that he wrote numerous screenplays for
10 Mosaic Media, that he was in constant contact with Gloria Fan, that his contributions
11 to the screenplays for *Batman Begins* and *The Dark Knight* were made for Mosaic
12 Media, and that he had access to Plaintiff's Screenplay and copied original elements to
13 the Screenplay in creating the film *The Unborn*.

14 34. In answering paragraph 34 of the FAC, Answering Defendant denies the
15 allegations set forth in the second sentence of paragraph 34. Answering Defendant
16 lacks sufficient information to admit or deny the remaining allegations in this
17 paragraph and on that basis denies each and every allegation set forth therein.

18 35. In answering paragraph 35 of the FAC, Answering Defendant denies
19 each and every allegation set forth therein.

FIRST CAUSE OF ACTION

(For Violation of the Federal Copyright Act, 17 U.S.C. § 101 *et seq.*)

(Against All Defendants)

23 36. In answering paragraph 36 of the FAC, Answering Defendant hereby
24 incorporates by reference the responses set forth above in paragraphs 1 through 35,
25 inclusive, as if fully set forth herein.

26 37. In answering paragraph 37 of the FAC, Answering Defendant denies
27 each and every allegation set forth therein.

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1 38. In answering paragraph 38 of the FAC, Answering Defendant denies
2 each and every allegation set forth therein.

3 39. In answering paragraph 39 of the FAC, Answering Defendant denies
4 each and every allegation set forth therein.

5 40. In answering paragraph 40 of the FAC, Answering Defendant denies
6 each and every allegation set forth therein.

SECOND CAUSE OF ACTION

(Breach of Implied in Fact Contract)

(Against David S. Goyer)

10 41. In answering paragraph 41 of the FAC, Answering Defendant hereby
11 incorporates by reference the responses set forth above in paragraphs 1 through 40,
12 inclusive, as if fully set forth herein.

13 42. In answering paragraph 42 of the FAC, Answering Defendant denies
14 each and every allegation set forth therein.

15 43. In answering paragraph 43 of the FAC, Answering Defendant denies
16 each and every allegation set forth therein.

17 44. In answering paragraph 44 of the FAC, Answering Defendant denies
18 each and every allegation set forth therein.

AFFIRMATIVE DEFENSES

First Affirmative Defense

(Failure to State a Claim)

24 1. As a first affirmative defense to the causes of action asserted against
25 Answering Defendant in the FAC, Answering Defendant alleges that the FAC fails to
26 state a claim upon which relief may be granted.

27 | //

28 | //

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Second Affirmative Defense**(Fair Use)**

2. As a second affirmative defense, Answering Defendant affirmatively alleges that if any elements of protectible expression contained in Plaintiff's works were in any manner used or incorporated into the film *The Unborn*, which Answering Defendant expressly denies, such use constitutes a fair use, and Plaintiff is precluded from obtaining any relief therefore.

Third Affirmative Defense**(Scenes A Faire)**

3. As a third affirmative defense, Answering Defendant affirmatively alleges that if any material, concepts or ideas contained in Plaintiff's work were in any manner used or incorporated into the film *The Unborn*, which Answering Defendant expressly denies, Plaintiff is precluded from obtaining any relief therefore because such material, concepts and/or ideas constitute unprotectible scenes a fair and/or stock scenes.

Fourth Affirmative Defense**(Established Facts)**

4. As a fourth affirmative defense, Answering Defendant affirmatively alleges that if any material, concepts or ideas contained in Plaintiff's work were in any manner used or incorporated into the film *The Unborn*, which Answering Defendant expressly denies, Plaintiff is precluded from obtaining any relief therefore because such material, concepts and/or ideas constitute unprotectible established facts.

Fifth Affirmative Defense**(Lack of Novelty)**

5. As a fifth affirmative defense, Answering Defendant affirmatively alleges that Plaintiff's claims are barred, in whole or in part, because his ideas were not novel and/or were already known to Answering Defendant.

28 // /

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Sixth Affirmative Defense**(Statutes of Limitations)**

6. As a sixth affirmative defense, Answering Defendant affirmatively alleges that Plaintiff's claims are barred, in whole or in part, by the provisions of the applicable statutes of limitation, including but not limited to, the limitations period set forth in 17 U.S.C. § 507(b) and Cal. Civ. Proc. Code § 339.

Seventh Affirmative Defense**(Independent Creation)**

7. As a seventh affirmative defense, Answering Defendant affirmatively alleges that Plaintiff's claims are barred, in whole or in part, because the film *The Unborn*, upon which Plaintiff's claims are based, was conceived, created and developed independently of Plaintiff, and without the use of any materials, concepts, ideas or writings allegedly submitted by Plaintiff.

Eighth Affirmative Defense**(Non-Protectibility)**

8. As an eighth affirmative defense, Answering Defendant affirmatively alleges that if any material, concepts or ideas contained in Plaintiff's work were in any manner used or incorporated into the film *The Unborn*, which Answering Defendant expressly denies, Plaintiff is precluded from obtaining any relief therefore because such material, concepts and/or ideas do not constitute material protected by the United States, or the State of California, or any other state.

Ninth Affirmative Defense**(No Statutory Damages)**

9. As a ninth affirmative defense, Answering Defendant affirmatively alleges that Plaintiff is precluded from recovering statutory damages or attorney's fees for copyright infringement by virtue of 17 U.S.C. § 412.

27 ///

28 ///

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Tenth Affirmative Defense

(No Similarity)

3 10. As a tenth affirmative defense, Answering Defendant affirmatively
4 alleges that Plaintiff is barred from obtaining any relief under his FAC because there
5 is no actionable similarity between Plaintiff's alleged works and the film *The Unborn*.

Eleventh Affirmative Defense

(Public Domain)

8 11. As an eleventh affirmative defense, Answering Defendant affirmatively
9 alleges that Plaintiff is barred from obtaining any relief under his FAC because all of
10 the material, concepts, or ideas which Plaintiff alleges appear in both his own work
11 and the film *The Unborn* are in the public domain and are of no value.

Twelfth Affirmative Defense

(First Amendment)

14 12. As a twelfth affirmative defense, Answering Defendant affirmatively
15 alleges that Plaintiff is barred from obtaining the relief he seeks by the First
16 Amendment to the Constitution of the United States of America and Article I, § 2(a)
17 of the Constitution of the State of California.

Thirteenth Affirmative Defense

(Waiver)

20 13. As a thirteenth affirmative defense, Answering Defendant affirmatively
21 alleges that Plaintiff is barred from obtaining any relief under his FAC because he has
22 knowingly and voluntarily waived the rights he now attempts to assert and/or any
23 claims he may have had.

Fourteenth Affirmative Defense

(Laches)

26 14. As a fourteenth affirmative defense, Answering Defendant affirmatively
27 alleges that Plaintiff, by his actions or inactions upon which the Answering Defendant

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1 reasonably relied to his detriment, is barred by the doctrine of laches from asserting
2 any claims he may have had.

3 **Fifteenth Affirmative Defense**

4 **(Lack or Inadequacy of Consideration)**

5 15. As a fifteenth affirmative defense, Answering Defendant affirmatively
6 alleges that Plaintiff is barred, in whole or in part, from obtaining any relief for breach
7 of implied contract because the purported implied contract fails for lack or inadequacy
8 of consideration.

9 **Sixteenth Affirmative Defense**

10 **(Lack of Essential Terms/Vagueness)**

11 16. As a sixteenth affirmative defense, Answering Defendant affirmatively
12 alleges that Plaintiff is barred, in whole or in part, from obtaining any relief for breach
13 of implied contract because the purported implied contract is too indefinite, vague,
14 ambiguous and/or is missing essential terms.

15 **Seventeenth Affirmative Defense**

16 **(Preemption)**

17 17. As a seventeenth affirmative defense, Answering Defendant affirmatively
18 alleges that Plaintiff's state law claim is preempted by the Federal Copyright Act.

19 **Eighteenth Affirmative Defense**

20 **(No Express or Implied Contract)**

21 18. As an eighteenth affirmative defense, Answering Defendant affirmatively
22 alleges that there was no contract, either express or implied, in law or fact, or any
23 other type of agreement whatsoever between Answering Defendant, on the one hand,
24 and Plaintiff, on the other.

25 **Additional Affirmative Defenses**

26 Answering Defendant reserves the right to allege affirmative defenses and
27 additional facts supporting his defenses after conducting further discovery,
28 investigation, research and analysis.

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1 PRAYER FOR RELIEF

2 WHEREFORE, ANSWERING DEFENDANT prays for relief as follows:

3 1. That Plaintiff takes nothing by way of the FAC;

4 2. That judgment be entered in favor of Answering Defendant and against

5 Plaintiff;

6 3. That Answering Defendant be awarded his costs of suit incurred herein

7 and reasonable attorneys' fees; and

8 4. Any other relief the Court deems appropriate.

9 Respectfully submitted,

10 Dated: November 29, 2010

11 KATTEN MUCHIN ROSENMAN LLP
12 Joel R. Weiner
13 Gail M. Title
14 Gloria C. Franke

15 By: s/ Joel R. Weiner
16 Attorneys for Defendants ROGUE PICTURES, a
17 division of Relativity Media, LLC,
18 UNIVERSAL STUDIOS HOME
19 ENTERTAINMENT LLC, UNIVERSAL STUDIOS
20 HOME ENTERTAINMENT PRODUCTIONS LLC,
21 PLATINUM DUNES PRODUCTIONS, PHANTOM
22 FOUR FILMS, DAVID S. GOYER and JESSIKA
23 BORSICZKY GOYER

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1 **DEMAND FOR JURY TRIAL**
2

3 Defendant David S. Goyer respectfully demands a trial by jury pursuant to Rule
4 38 of the Federal Rules of Civil Procedure on any and all issues for which they are
5 entitled to a trial by jury.
6

7 Respectfully submitted,
8

9 Dated: November 29, 2010 KATTEN MUCHIN ROSENMAN LLP
10 Joel R. Weiner
11 Gail M. Title
12 Gloria C. Franke
13

14 By: s/ Joel R. Weiner
15 Attorneys for Defendants ROGUE PICTURES, a
16 division of Relativity Media, LLC,
17 UNIVERSAL STUDIOS HOME
18 ENTERTAINMENT LLC, UNIVERSAL STUDIOS
19 HOME ENTERTAINMENT PRODUCTIONS LLC,
20 PLATINUM DUNES PRODUCTIONS, PHANTOM
21 FOUR FILMS, DAVID S. GOYER and JESSIKA
22 BORSICZKY GOYER
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7 Attorneys for defendants ROGUE PICTURES, a division
8 of Relativity Media, LLC, UNIVERSAL STUDIOS
9 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
10 HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER
and JESSIKA BORSICZKY GOYER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

14 DANIEL SEGAL, an individual, } Case No. CV10 5650 DSF (FFMx)
15 Plaintiff, } [Hon. Dale S. Fischer]

16 || vs.

17 ROGUE PICTURES, a business entity,
18 form unknown, UNIVERSAL STUDIOS
19 HOME ENTERTAINMENT LLC, a
20 California limited liability company,
21 UNIVERSAL STUDIOS HOME
22 ENTERTAINMENT PRODUCTIONS
23 LLC, a California limited liability
24 company, PLATINUM DUNES
25 PRODUCTIONS, a California
corporation, PHANTOM FOUR FILMS,
a California corporation, DAVID S.
GOYER, an individual, MICHAEL
BAY, an individual, ANDREW FORM,
an individual, BRAD FULLER, an
individual, JESSIKA BORSICZKY
GOYER, an individual, WILLIAM
BEASLEY, an individual, and DOES 1-
50 inclusive

UNIVERSAL STUDIOS HOME
ENTERTAINMENT LLC AND
UNIVERSAL STUDIOS
HOME ENTERTAINMENT
PRODUCTIONS LLC'S ANSWER
TO FIRST AMENDED
COMPLAINT

Defendants.

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1 22. In answering paragraph 22 of the FAC, Answering Defendants lack
 2 sufficient information to admit or deny the allegations in this paragraph and on that
 3 basis deny each and every allegation set forth therein.

4 23. In answering paragraph 23 of the FAC, Answering Defendants lack
 5 sufficient information to admit or deny the allegations in this paragraph and on that
 6 basis deny each and every allegation set forth therein.

7 24. In answering paragraph 24 of the FAC, Answering Defendants lack
 8 sufficient information to admit or deny the allegations in this paragraph and on that
 9 basis deny each and every allegation set forth therein.

10 DEFENDANTS' INFRINGEMENT OF PLAINTIFF'S SCREENPLAY

11 25. In answering paragraph 25 of the FAC, Answering Defendants lack
 12 sufficient information to admit or deny the allegations in this paragraph and on that
 13 basis deny each and every allegation set forth therein.

14 26. In answering paragraph 26 of the FAC, Answering Defendants lack
 15 sufficient information to admit or deny the allegations in this paragraph and on that
 16 basis deny each and every allegation set forth therein.

17 27. In answering paragraph 27 of the FAC, Answering Defendants lack
 18 sufficient information to admit or deny the allegations in this paragraph and on that
 19 basis deny each and every allegation set forth therein.

20 28. In answering paragraph 28 of the FAC, Answering Defendants lack
 21 sufficient information to admit or deny the allegations in this paragraph and on that
 22 basis deny each and every allegation set forth therein.

23 29. In answering paragraph 29 of the FAC, Answering Defendants lack
 24 sufficient information to admit or deny the allegations in this paragraph and on that
 25 basis deny each and every allegation set forth therein.

26 ///

27 ///

28

Case 2:10-cv-05650-DSF -FFM Document 18 Filed 11/29/10 Page 6 of 13 Page ID #:140

1 30. In answering paragraph 30 of the FAC, Answering Defendants lack
 2 sufficient information to admit or deny the allegations in this paragraph and on that
 3 basis deny each and every allegation set forth therein.

4 31. In answering paragraph 31 of the FAC, Answering Defendants lack
 5 sufficient information to admit or deny the allegations in this paragraph and on that
 6 basis deny each and every allegation set forth therein.

7 32. In answering paragraph 32 of the FAC, Answering Defendants lack
 8 sufficient information to admit or deny the allegations in this paragraph and on that
 9 basis deny each and every allegation set forth therein. Further, Answering Defendants
 10 deny that the film *The Unborn* is substantially similar to Plaintiff's Screenplay and
 11 further deny that defendant David S. Goyer or anyone associated with *The Unborn*
 12 copied from Plaintiff's Screenplay.

13 33. In answering paragraph 33 of the FAC, Answering Defendants admit
 14 upon information and belief that David S. Goyer is credited on the films *Batman*
 15 *Begins* and *The Dark Knight*. Answering Defendants lack sufficient information to
 16 admit or deny the remaining allegations in this paragraph and on that basis deny each
 17 and every allegation set forth therein, except deny that David S. Goyer had access to
 18 Plaintiff's Screenplay and copied original elements to the Screenplay in creating the
 19 film *The Unborn*.

20 34. In answering paragraph 34 of the FAC, Answering Defendants lack
 21 sufficient information to admit or deny the allegations in this paragraph and on that
 22 basis deny each and every allegation set forth therein.

23 35. In answering paragraph 35 of the FAC, Answering Defendants deny each
 24 and every allegation set forth therein.

25 ///

26 ///

27 ///

28

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#:146

Respectfully submitted,

Dated: November 29, 2010

KATTEN MUCHIN ROSENMAN LLP

Joel R. Weiner

Gail M. Title

Gloria C. Franke

By: s/ Joel R. Weiner

Attorneys for Defendants ROGUE PICTURES, a

division of Relativity Media, LLC.

UNIVERSAL STUD

ENTERTAINMENT L

HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER and JESSIKA
BORSICZKY GOYER

BORSCHEK 80131

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8 of Relativity Media, LLC, UNIVERSAL STUDIOS
9 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
10 HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER
and JESSIKA BORSICZKY GOYER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

14 DANIEL SEGAL, an individual,)
15 Plaintiff,)
16 vs.)
17 ROGUE PICTURES, a business entity,)
form unknown, UNIVERSAL STUDIOS)
18 HOME ENTERTAINMENT LLC, a)
California limited liability company,)
19 UNIVERSAL STUDIOS HOME)
ENTERTAINMENT PRODUCTIONS)
20 LLC, a California limited liability)
company, PLATINUM DUNES)
21 PRODUCTIONS, a California)
corporation, PHANTOM FOUR FILMS,)
22 a California corporation, DAVID S.)
GOYER, an individual, MICHAEL)
23 BAY, an individual, ANDREW FORM,)
an individual, BRAD FULLER, an)
24 individual, JESSIKA BORSICZKY)
GOYER, an individual, WILLIAM)
25 BEASLEY, an individual, and DOES 1-)
50, inclusive,)
26 Defendants.)
Case No. CV10 5650 DSF (FFMx)
[Hon. Dale S. Fischer]

**ROGUE PICTURES' ANSWER TO
FIRST AMENDED COMPLAINT**

ROGUE PICTURES' ANSWER TO FIRST AMENDED COMPLAINT

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1 23. In answering paragraph 23 of the FAC, Answering Defendant lacks
 2 sufficient information to admit or deny the allegations in this paragraph and on that
 3 basis denies each and every allegation set forth therein.

4 24. In answering paragraph 24 of the FAC, Answering Defendant lacks
 5 sufficient information to admit or deny the allegations in this paragraph and on that
 6 basis denies each and every allegation set forth therein.

7 DEFENDANTS' INFRINGEMENT OF PLAINTIFF'S SCREENPLAY

8 25. In answering paragraph 25 of the FAC, Answering Defendant lacks
 9 sufficient information to admit or deny the allegations in this paragraph and on that
 10 basis denies each and every allegation set forth therein.

11 26. In answering paragraph 26 of the FAC, Answering Defendant lacks
 12 sufficient information to admit or deny the allegations in this paragraph and on that
 13 basis denies each and every allegation set forth therein.

14 27. In answering paragraph 27 of the FAC, Answering Defendant lacks
 15 sufficient information to admit or deny the allegations in this paragraph and on that
 16 basis denies each and every allegation set forth therein.

17 28. In answering paragraph 28 of the FAC, Answering Defendant lacks
 18 sufficient information to admit or deny the allegations in this paragraph and on that
 19 basis denies each and every allegation set forth therein.

20 29. In answering paragraph 29 of the FAC, Answering Defendant lacks
 21 sufficient information to admit or deny the allegations in this paragraph and on that
 22 basis denies each and every allegation set forth therein.

23 30. In answering paragraph 30 of the FAC, Answering Defendant lacks
 24 sufficient information to admit or deny the allegations in this paragraph and on that
 25 basis denies each and every allegation set forth therein.

26 31. In answering paragraph 31 of the FAC, Answering Defendant admits that
 27 on January 9, 2009, *The Unborn* opened in approximately 2,357 theaters nationwide

28

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1 and grossed approximately \$19,810,585 in North America Box Office receipts in its
 2 first weekend.

3 32. In answering paragraph 32 of the FAC, Answering Defendant lacks
 4 sufficient information to admit or deny the allegations in this paragraph and on that
 5 basis denies each and every allegation set forth therein. Further, Answering
 6 Defendant denies that the film *The Unborn* is substantially similar to Plaintiff's
 7 Screenplay and further denies that defendant David S. Goyer or anyone associated
 8 with *The Unborn* copied from Plaintiff's Screenplay.

9 33. In answering paragraph 33 of the FAC, Answering Defendant admits
 10 upon information and belief that David S. Goyer is credited on the films *Batman*
 11 *Begins* and *The Dark Knight*. Answering Defendant lacks sufficient information to
 12 admit or deny the remaining allegations in this paragraph and on that basis denies each
 13 and every allegation set forth therein, except denies that David S. Goyer had access to
 14 Plaintiff's Screenplay and copied original elements to the Screenplay in creating the
 15 film *The Unborn*.

16 34. In answering paragraph 34 of the FAC, Answering Defendant lacks
 17 sufficient information to admit or deny the allegations in this paragraph and on that
 18 basis denies each and every allegation set forth therein.

19 35. In answering paragraph 35 of the FAC, Answering Defendant denies
 20 each and every allegation set forth therein.

21 **FIRST CAUSE OF ACTION**

22 **(For Violation of the Federal Copyright Act, 17 U.S.C. § 101 *et seq.*)**

23 **(Against All Defendants)**

24 36. In answering paragraph 36 of the FAC, Answering Defendant hereby
 25 incorporates by reference the responses set forth above in paragraphs 1 through 35,
 26 inclusive, as if fully set forth herein.

27 37. In answering paragraph 37 of the FAC, Answering Defendant denies
 28 each and every allegation set forth therein.

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#:158

PRAYER FOR RELIEF

WHEREFORE, ANSWERING DEFENDANT prays for relief as follows:

1. That Plaintiff takes nothing by way of the FAC;
2. That judgment be entered in favor of Answering Defendant and against Plaintiff;
3. That Answering Defendant be awarded its costs of suit incurred herein and reasonable attorneys' fees; and
4. Any other relief the Court deems appropriate.

Respectfully submitted,

Dated: November 29, 2010

KATTEN MUCHIN ROSENMAN LLP
Joel R. Weiner
Gail M. Title
Gloria C. Franke

By: s/ Joel R. Weiner
Attorneys for Defendants ROGUE PICTURES, a
division of Relativity Media, LLC,
UNIVERSAL STUDIOS HOME
ENTERTAINMENT LLC, UNIVERSAL STUDIOS
HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER and JESSIKA
BORSICZKY GOYER

Case 2:10-cv-05650-DSF -fFM Document 20 Filed 11/29/10 Page 1 of 12 Page ID #:160

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8 of Relativity Media, LLC, UNIVERSAL STUDIOS
9 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
10 HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER
and JESSIKA BORSICZKY GOYER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

14 DANIEL SEGAL, an individual, }
15 Plaintiff, }
16 vs. }
17 ROGUE PICTURES, a business entity, }
form unknown, UNIVERSAL STUDIOS }
HOME ENTERTAINMENT LLC, a }
California limited liability company, }
UNIVERSAL STUDIOS HOME }
ENTERTAINMENT PRODUCTIONS }
LLC, a California limited liability }
company, PLATINUM DUNES }
PRODUCTIONS, a California }
corporation, PHANTOM FOUR FILMS, }
a California corporation, DAVID S. }
GOYER, an individual, MICHAEL }
BAY, an individual, ANDREW FORM, }
an individual, BRAD FULLER, an }
individual, JESSIKA BORSICZKY }
GOYER, an individual, WILLIAM }
BEASLEY, an individual, and DOES 1- }
50, inclusive, }
26 Defendants. }
27
28 Case No. CV10 5650 DSF (FFMx)
29 [Hon. Dale S. Fischer]
30
31 **PLATINUM DUNES**
PRODUCTIONS' ANSWER TO
FIRST AMENDED COMPLAINT

**PLATINUM DUNES
PRODUCTIONS' ANSWER TO
FIRST AMENDED COMPLAINT**

Case 2:10-cv-05650-DSF -FFM Document 20 Filed 11/29/10 Page 5 of 12 Page ID #:164

1 DEFENDANTS' INFRINGEMENT OF PLAINTIFF'S SCREENPLAY2 25. In answering paragraph 25 of the FAC, Answering Defendant lacks
3 sufficient information to admit or deny the allegations in this paragraph and on that
4 basis denies each and every allegation set forth therein.5 26. In answering paragraph 26 of the FAC, Answering Defendant lacks
6 sufficient information to admit or deny the allegations in this paragraph and on that
7 basis denies each and every allegation set forth therein.8 27. In answering paragraph 27 of the FAC, Answering Defendant lacks
9 sufficient information to admit or deny the allegations in this paragraph and on that
10 basis denies each and every allegation set forth therein.11 28. In answering paragraph 28 of the FAC, Answering Defendant lacks
12 sufficient information to admit or deny the allegations in this paragraph and on that
13 basis denies each and every allegation set forth therein.14 29. In answering paragraph 29 of the FAC, Answering Defendant lacks
15 sufficient information to admit or deny the allegations in this paragraph and on that
16 basis denies each and every allegation set forth therein.17 30. In answering paragraph 30 of the FAC, Answering Defendant lacks
18 sufficient information to admit or deny the allegations in this paragraph and on that
19 basis denies each and every allegation set forth therein.20 31. In answering paragraph 31 of the FAC, Answering Defendant lacks
21 sufficient information to admit or deny the allegations in this paragraph and on that
22 basis denies each and every allegation set forth therein.23 32. In answering paragraph 32 of the FAC, Answering Defendant lacks
24 sufficient information to admit or deny the allegations in this paragraph and on that
25 basis denies each and every allegation set forth therein. Further, Answering
26 Defendant denies that the film *The Unborn* is substantially similar to Plaintiff's
27 Screenplay and further denies that defendant David S. Goyer or anyone associated
28 with *The Unborn* copied from Plaintiff's Screenplay.

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1 33. In answering paragraph 33 of the FAC, Answering Defendant admits
2 upon information and belief that David S. Goyer is credited on the films *Batman*
3 *Begins* and *The Dark Knight*. Answering Defendant lacks sufficient information to
4 admit or deny the remaining allegations in this paragraph and on that basis denies each
5 and every allegation set forth therein, except denies that David S. Goyer had access to
6 Plaintiff's Screenplay and copied original elements to the Screenplay in creating the
7 film *The Unborn*.

8 34. In answering paragraph 34 of the FAC, Answering Defendant lacks
9 sufficient information to admit or deny the allegations in this paragraph and on that
10 basis denies each and every allegation set forth therein.

11 35. In answering paragraph 35 of the FAC, Answering Defendant denies
12 each and every allegation set forth therein.

FIRST CAUSE OF ACTION

(For Violation of the Federal Copyright Act, 17 U.S.C. § 101 *et seq.*)

(Against All Defendants)

16 36. In answering paragraph 36 of the FAC, Answering Defendant hereby
17 incorporates by reference the responses set forth above in paragraphs 1 through 35,
18 inclusive, as if fully set forth herein.

19 37. In answering paragraph 37 of the FAC, Answering Defendant denies
20 each and every allegation set forth therein.

21 38. In answering paragraph 38 of the FAC, Answering Defendant denies
22 each and every allegation set forth therein.

23 39. In answering paragraph 39 of the FAC, Answering Defendant denies
24 each and every allegation set forth therein.

25 40. In answering paragraph 40 of the FAC, Answering Defendant denies
26 each and every allegation set forth therein.

27 | //

28 | //

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7 Attorneys for defendants ROGUE PICTURES, a division
8 of Relativity Media, I.I.C., UNIVERSAL STUDIOS
9 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER
10 and JESSIKA BORSICZKY GOYER

14 DANIEL SEGAL, an individual, }
15 Plaintiff, }
16 vs. }
17 ROGUE PICTURES, a business entity }
form unknown, UNIVERSAL STUDIOS }
18 HOME ENTERTAINMENT LLC, a }
California limited liability company, }
19 UNIVERSAL STUDIOS HOME }
ENTERTAINMENT PRODUCTIONS }
20 LLC, a California limited liability }
company, PLATINUM DUNES }
21 PRODUCTIONS, a California }
corporation, PHANTOM FOUR FILMS, }
22 a California corporation, DAVID S. }
GOYER, an individual, MICHAEL }
23 BAY, an individual, ANDREW FORM, }
an individual, BRAD FULLER, an }
24 individual, JESSIKA BORSICZKY }
GOYER, an individual, WILLIAM }
25 BEASLEY, an individual, and DOES 1- }
50, inclusive, }
26 Defendants. }

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1 24. In answering paragraph 24 of the FAC, Answering Defendant lacks
 2 sufficient information to admit or deny the allegations in this paragraph and on that
 3 basis denies each and every allegation set forth therein.

4 DEFENDANTS' INFRINGEMENT OF PLAINTIFF'S SCREENPLAY

5 25. In answering paragraph 25 of the FAC, Answering Defendant lacks
 6 sufficient information to admit or deny the allegations in this paragraph and on that
 7 basis denies each and every allegation set forth therein.

8 26. In answering paragraph 26 of the FAC, Answering Defendant lacks
 9 sufficient information to admit or deny the allegations in this paragraph and on that
 10 basis denies each and every allegation set forth therein.

11 27. In answering paragraph 27 of the FAC, Answering Defendant lacks
 12 sufficient information to admit or deny the allegations in this paragraph and on that
 13 basis denies each and every allegation set forth therein.

14 28. In answering paragraph 28 of the FAC, Answering Defendant lacks
 15 sufficient information to admit or deny the allegations in this paragraph and on that
 16 basis denies each and every allegation set forth therein.

17 29. In answering paragraph 29 of the FAC, Answering Defendant lacks
 18 sufficient information to admit or deny the allegations in this paragraph and on that
 19 basis denies each and every allegation set forth therein.

20 30. In answering paragraph 30 of the FAC, Answering Defendant lacks
 21 sufficient information to admit or deny the allegations in this paragraph and on that
 22 basis denies each and every allegation set forth therein.

23 31. In answering paragraph 31 of the FAC, Answering Defendant lacks
 24 sufficient information to admit or deny the allegations in this paragraph and on that
 25 basis denies each and every allegation set forth therein.

26 32. In answering paragraph 32 of the FAC, Answering Defendant lacks
 27 sufficient information to admit or deny the allegations in this paragraph and on that
 28 basis denies each and every allegation set forth therein. Further, Answering

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1 Defendant denies that the film *The Unborn* is substantially similar to Plaintiff's
2 Screenplay and further denies that defendant David S. Goyer or anyone associated
3 with *The Unborn* copied from Plaintiff's Screenplay.

4 33. In answering paragraph 33 of the FAC, Answering Defendant admits
5 upon information and belief that David S. Goyer is credited on the films *Batman*
6 *Begins* and *The Dark Knight*. Answering Defendant lacks sufficient information to
7 admit or deny the remaining allegations in this paragraph and on that basis denies each
8 and every allegation set forth therein, except denies that David S. Goyer had access to
9 Plaintiff's Screenplay and copied original elements to the Screenplay in creating the
10 film *The Unborn*.

11 34. In answering paragraph 34 of the FAC, Answering Defendant lacks
12 sufficient information to admit or deny the allegations in this paragraph and on that
13 basis denies each and every allegation set forth therein.

14 35. In answering paragraph 35 of the FAC, Answering Defendant denies
15 each and every allegation set forth therein.

FIRST CAUSE OF ACTION

(For Violation of the Federal Copyright Act, 17 U.S.C. § 101 *et seq.*)

(Against All Defendants)

19 36. In answering paragraph 36 of the FAC, Answering Defendant hereby
20 incorporates by reference the responses set forth above in paragraphs 1 through 35,
21 inclusive, as if fully set forth herein.

22 37. In answering paragraph 37 of the FAC, Answering Defendant denies
23 each and every allegation set forth therein.

24 38. In answering paragraph 38 of the FAC, Answering Defendant denies
25 each and every allegation set forth therein.

26 39. In answering paragraph 39 of the FAC, Answering Defendant denies
27 each and every allegation set forth therein.

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#182

- 1 3. That Answering Defendant be awarded her costs of suit incurred herein
- 2 and reasonable attorneys' fees; and
- 3 4. Any other relief the Court deems appropriate.

Respectfully submitted,

Dated: November 29, 2010 KATTEN MUCHIN ROSENMAN LLP

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Gail M. Title
Gloria C. Franke

By: s/ Joel R. Weiner
Attorneys for Defendants ROGUE PICTURES, a
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ENTERTAINMENT LLC, UNIVERSAL STUDIOS
HOME ENTERTAINMENT PRODUCTIONS LLC,
PLATINUM DUNES PRODUCTIONS, PHANTOM
FOUR FILMS, DAVID S. GOYER and JESSIKA
BORSICZKY GOYER

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL SEGAL, } CASE NO. CV 10-05650 DSF (FMOx)
Plaintiff(s), } ORDER RE JURY TRIAL
v. }
ROGUE PICTURES, }
Defendant(s). }

I. ORDER RE DEADLINES:

- A. Adding Parties or Amending Pleadings: November 29, 2011;
- B. Discovery Cut-off: March 30, 2012 (Damages) and January 17, 2012 (Liability);
- C. Expert Witness Exchange Deadline: Initial: February 17, 2012 (Damages) and September 14, 2011 (Liability); Rebuttal: October 14, 2011 (Liability) and March 14, 2012 (Damages); Cut-off: January 17, 2012 (Liability) and March 30, 2012 (Damages);
- D. Motion Hearing Cut-off: February 6, 2012;
- E. Settlement Conference Cut-off: February 21, 2012;
- F. Final Pretrial Conference: April 16, 2012 at 3:00 p.m.;
- G. Trial Date: May 15, 2012 at 8:00 a.m.

II. ORDER RE TRIAL PREPARATION

III. ORDER GOVERNING CONDUCT OF ATTORNEYS AND PARTIES

revised 11-12-08

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1

DEADLINES

A. PARTIES/PLEADINGS

The Court has established a cut-off date for adding parties or amending pleadings. All motions to add parties or to amend the pleadings must be noticed to be heard on or before the cut-off date. All unserved parties will be dismissed at the time of the pretrial conference pursuant to Local Rule 16-8.1.

B. DISCOVERY AND DISCOVERY CUT-OFF

1. Discovery Cut-off: The Court has established a cut-off date for discovery, including expert discovery, if applicable. This is not the date by which discovery requests must be served; it is the date by which all discovery, including all hearings on any related motions, is to be completed.

2. Discovery Disputes: Counsel are expected to comply with all Local Rules and the Federal Rules of Civil Procedure concerning discovery. Whenever possible, the Court expects counsel to resolve discovery problems among themselves in a courteous, reasonable, and professional manner. The Court expects that counsel will adhere strictly to the Civility and Professionalism Guidelines (which can be found on the Court's website under "Attorney Information> Attorney Admissions").

3. Discovery Motions: Any motion challenging the adequacy of discovery responses must be filed, served, and calendared sufficiently in advance of the discovery cut-off date to permit the responses to be obtained before that date, if the motion is granted.

4. Depositions: All depositions shall commence sufficiently in advance of the discovery cut-off date to permit their completion and to permit the deposing party enough time to bring any discovery motions concerning the deposition before the cut-off date. Given the requirements to “meet and confer.” and notice

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1 requirements, in most cases a planned motion to compel must be discussed with
2 opposing counsel at least six weeks before the cut-off.

3 5. Written Discovery: All interrogatories, requests for production of
4 documents, and requests for admissions must be served sufficiently in advance of
5 the discovery cut-off date to permit the discovering party enough time to
6 challenge (via motion practice) responses deemed to be deficient.

7 6. Expert Discovery: All disclosures must be made in writing. The parties
8 should begin expert discovery shortly after the initial designation of experts. The
9 final pretrial conference and trial dates will not be continued merely because
10 expert discovery is not completed. Failure to comply with these or any other
11 orders concerning expert discovery may result in the expert being excluded as a
12 witness.

13 C. LAW AND MOTION

14 The Court has established a cut-off date for the hearing of motions. All
15 motions must be noticed so that the hearing takes place on or before the motion
16 cut-off date. Counsel must provide Chambers with conformed Chambers copies
17 of all documents. Chambers copies should not be put in envelopes. Counsel
18 should consult the Court's Standing Order, previously provided, to determine the
19 Court's requirements concerning motions. A copy of the Standing Order is also
20 available on the Court's website at www.cacd.uscourts.gov>Judges' Procedures
21 and Schedules>Hon. Dale S. Fischer.

22 D. FINAL PRETRIAL CONFERENCE

23 1. A final pretrial conference date has been set pursuant to Rule 16 of the
24 Federal Rules of Civil Procedure and Local Rule 16-8. Unless excused for good
25 cause, each party appearing in this action shall be represented at the final pretrial
26 conference by the attorney who is to have charge of the conduct of the trial on
27 behalf of such party. Counsel should be prepared to discuss streamlining the trial,
28 including presentation of testimony by deposition excerpts or summaries, time

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2 **N.B. "COUNSEL," AS USED IN THIS ORDER, INCLUDES PARTIES**
3 **APPEARING IN *PROPRIA PERSONA*.**

4

5 IT IS SO ORDERED.

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8 DATED: March 28, 2011



Dale S. Fischer
United States District Judge

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Case 2:10-cv-05650-DSF -AJW Document 29-2 Filed 07/11/11 Page 1 of 3 Page ID
#:271

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 8 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
 HOME ENTERTAINMENT PRODUCTIONS LLC,
 9 PLATINUM DUNES PRODUCTIONS, PHANTOM
 FOUR FILMS, DAVID S. GOYER
 10 and JESSIKA BORSICZKY GOYER

11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**
 13 **WESTERN DIVISION, LOS ANGELES**

14 DANIEL SEGAL, an individual,) CASE NO. 2:10-cv-05650 DSF (AJWx)
 15 Plaintiff,)
 16 vs.)
 17 ROGUE PICTURES, a business entity,)
 form unknown, UNIVERSAL STUDIOS)
 18 HOME ENTERTAINMENT LLC, a)
 California limited liability company,)
 UNIVERSAL STUDIOS HOME)
 19 ENTERTAINMENT PRODUCTIONS)
 LLC, a California limited liability)
 20 company, PLATINUM DUNES)
 PRODUCTIONS, a California)
 21 corporation, PHANTOM FOUR FILMS,)
 a California corporation, DAVID S.)
 22 GOYER, an individual, JESSIKA)
 BORSICZKY GOYER, an individual,)
 23 and DOES 1-50, inclusive,)
 24 Defendants.)

25 **DECLARATION OF REBECCA F.**
 26 **GANZ IN SUPPORT OF**
 27 **DEFENDANTS' MOTION FOR**
 28 **JUDGMENT ON THE PLEADINGS**

DATE: August 8, 2011
 TIME: 1:30 p.m.
 PLACE: Courtroom 840

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Case 2:10-cv-05650-DSF -AJW Document 29-2 Filed 07/11/11 Page 2 of 3 Page ID #:272

1 **DECLARATION OF REBECCA F. GANZ**

2 I, Rebecca F. Ganz, hereby declare as follows:

3 1. I am an attorney licensed to practice law in the State of California and
 4 before this Court. I am an associate with the law firm Katten Muchin Rosenman LLP
 5 ("Katten"), attorneys of record for defendants Rogue Pictures, Universal Studios
 6 Home Entertainment LLC, Universal Studios Home Entertainment Productions LLC,
 7 Platinum Dunes Productions, Phantom Four Films, David S. Goyer and Jessika
 8 Borsiczky Goyer (collectively, "Defendants") in this action. I make this Declaration
 9 in support of Defendants' Motion for Judgment on the Pleadings. This declaration is
 10 based on my own personal knowledge, and, if called upon as a witness to testify to the
 11 facts set forth herein, I could and would do so competently.

12 2. In preparation for this Motion, I ordered and received from amazon.com
 13 DVD copies of Defendants' film *The Unborn*, a copy of which has been lodged with
 14 the Court pursuant to Defendants' Notice of Lodging. (See Notice of Lodging, ¶ 1);

15 3. In preparation for this Motion, I ordered and received from
 16 barnesandnoble.com copies of Plaintiff's novel *Transfers*, a copy of which has been
 17 lodged with the Court pursuant to Defendants' Notice of Lodging. (See Notice of
 18 Lodging, ¶ 2b);

19 4. In preparation for this Motion, I ordered and received from amazon.com
 20 the following well-known works depicting exorcisms, each of which has been lodged
 21 with the Court pursuant to Defendants' Notice of Lodging:

- 22 • DVD copy of the 1973 the classic and influential 1973 film, *The*
 23 *Exorcist*. (See Notice of Lodging, ¶ 3);
- 24 • DVD copy of the 2005 horror film *The Exorcism of Emily Rose*. (See
 25 Notice of Lodging, ¶ 4).

26 5. In preparation for this Motion, I ordered and received from amazon.com
 27 the following well-known work depicting a haunted twin, a copy of which has been
 28 lodged with the Court pursuant to Defendants' Notice of Lodging:

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#:273

- DVD copy of the 1972 psychological horror film, *The Other*, based on a novel of the same name. (See Notice of Lodging, ¶ 5).

3 6. In preparation for this Motion, I printed a copy of Plaintiff's screenplay
4 *Transfers*, which was provided to our offices by Plaintiff's counsel, Steven Lowe, at
5 our request and which has been lodged with the Court pursuant to Defendants' Notice
6 of Lodging. (See Notice of Lodging, ¶ 2a.)

7 I declare under penalty of perjury under the laws of the United States of
8 America that the foregoing is true and correct.

9 Executed on July 11, 2011 at Los Angeles, CA.

/s/ Rebecca F. Ganz

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#:274

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13 of Relativity Media, LLC, UNIVERSAL STUDIOS
14 HOME ENTERTAINMENT LLC, UNIVERSAL STUDIOS
15 HOME ENTERTAINMENT PRODUCTIONS LLC,
16 PLATINUM DUNES PRODUCTIONS, PHANTOM
17 FOUR FILMS, DAVID S. GOYER
18 and JESSIKA BORSICZKY GOYER

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

19 DANIEL SEGAL, an individual,) CASE NO. 2:10-cv-05650 DSF (AJWx)
20 Plaintiff,)
21 vs.)
22 ROGUE PICTURES, a business entity,)
23 form unknown, UNIVERSAL STUDIOS)
24 HOME ENTERTAINMENT LLC, a)
25 California limited liability company,)
26 UNIVERSAL STUDIOS HOME)
27 ENTERTAINMENT PRODUCTIONS)
28 LLC, a California limited liability)
DATE: August 8, 2011
TIME: 1:30 p.m.
PLACE: Courtroom 840
company, PLATINUM DUNES)
PRODUCTIONS, a California)
corporation, PHANTOM FOUR FILMS,)
a California corporation, DAVID S.)
GOYER, an individual, JESSIKA)
BORSICZKY GOYER, an individual,)
and DOES 1-50, inclusive,)
Defendants:)

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1 Defendants Rogue Pictures, Universal Studios Home Entertainment LLC,
2 Universal Studios Home Entertainment Productions LLC, Platinum Dunes
3 Productions, Phantom Four Films, David S. Goyer and Jessika Borsiczky Goyer
4 (collectively, "Defendants") request that the Court take judicial notice of the following
5 facts pursuant to Federal Rule of Evidence 201. Each of these facts is generally
6 known within the jurisdiction of the Court and/or is capable of accurate and ready
7 determination by the works attached hereto, the accuracy of which cannot be
8 reasonably questioned:

9 **THE WORKS AT ISSUE¹**

10 1. The content of the film *The Unborn*. A DVD copy of the theatrical
11 version is being lodged with the Court. (Notice of Lodging, ¶ 1.)

12 2. The content of Plaintiff's work *Transfers*. Both the screenplay and
13 novel versions of this work are being lodged with the Court. (Notice of Lodging, ¶¶
14 2a, 2b.)

15 **COMMON ELEMENTS IN THE HORROR GENRE**

16 A comparison of the works at issue compels the conclusion that the two works
17 lack any protectable similarity and Defendants' motion for judgment on the pleadings
18 should be granted. However, as further support for their motion, Defendants request
19 judicial notice that:

20 3. Works depicting exorcisms to get rid of unwanted demons or evil spirits
21 are common and prevalent, examples of which include, among many others, the
22 following:

23
24

25 ¹ As Plaintiff's screenplay and novel and Defendants' allegedly infringing film are
26 referenced in the First Amended Complaint and form the basis of Plaintiff's claim of
27 copyright infringement, the works are properly before the court under the doctrine of
incorporation and are considered to within the scope of the pleadings for ruling on a
12(c) motion. *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1139 (C.D. Cal.
2007) (Collins, J.); *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *Branch
v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Out of an abundance of caution,
Defendants also request judicial notice of the content of the works.

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1 (a) *The Exorcist*, the classic and influential 1973 film directed by
2 William Friedkin, features a young girl who becomes haunted by demons and
3 develops terrifying physical symptoms. When doctors are unable to diagnose her
4 ailment, the girl's mother enlists two priests to perform an exorcism. A DVD copy of
5 the movie is lodged concurrently herewith. (Notice of Lodging, ¶ 3.)

6 (b) *The Exorcism of Emily Rose*, a 2005 film about a young woman
7 who allegedly becomes possessed by demons. The doctors diagnose her with
8 epilepsy, but Emily continues to suffer physical symptoms even with medication. She
9 turns to her family's priest, who performs an exorcism. Emily dies after the failed
10 exorcism. A DVD copy of the movie is lodged concurrently herewith. (Notice of
11 Lodging, ¶ 4.)

4. The following elements are common and prevalent in “horror” genre films:

- (a) the lead character, often female, is haunted by demons or evil spirits;
- (b) the demons or evil spirits cause the lead character to experience physical symptoms;

- (c) the lead character relies on friends or family for support;
- (d) exorcisms are a tool used to repel demons or evil spirits that seek to take over the lead character.

20 5. The idea of a horror story depicting a haunted twin is also not original.
21 In *The Other*, a 1972 psychological horror film based on the novel of the same title,
22 twin boys, Niles and Holland, live with their extended family on a farm. Family
23 members and a neighbor begin to die mysteriously. Eventually, the viewer learns that
24 Holland has been dead for several months, and the living twin, Niles, has been taking
25 on Holland's persona and committing the evil acts as Holland. A DVD copy of the
26 movie is lodged concurrently herewith. (Notice of Lodging, ¶ 5.)

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1 **LEGAL AUTHORITY**

2 Federal Rule of Evidence 201(b) provides that a judicially noticed fact must be
3 "one not subject to reasonable dispute in that it is either (1) generally known within
4 the territorial jurisdiction of the trial court or (2) capable of accurate and ready
5 determination by resort to sources whose accuracy cannot reasonably be questioned."
6 F.R.E. 201(b). Judicial notice is mandatory if requested by a party and the court is
7 supplied with the necessary information. F.R.E. 201(d). Judicial notice is otherwise
8 discretionary, and may be taken whether requested or not. F.R.E. 201(c).

9 Each of the facts for which Defendants request judicial notice meet one or both
10 of the standards for judicial notice, either one of which would be sufficient.

11 First, since their contents are alleged in the FAC and their authenticity is not in
12 question, the Court may take judicial notice of Plaintiff's novel and screenplay
13 *Transfers* and Defendants' film *The Unborn*. See Wild v. NBC Universal, Inc., -- F.
14 Supp. 2d --, 2011 WL 2182420, *2 n.1 (C.D. Cal. 2011) (Plaintiff's work
15 and Defendants' allegedly infringing work were before the court pursuant to
16 Defendants' request for judicial notice); Capcom Co., Ltd. v. MKR Group, Inc., No. C
17 08-0904, 2008 WL 4661479, at *3 (N.D. Cal. Oct. 20, 2008) (same); Scott v. Meyer,
18 09-cv-6076 ODW (RZx) (Doc. No. 20, at p. 4 of 11) (C.D. Cal. November 24, 2009)
19 (same); Zella, 529 F. Supp. 2d at 1129.

20 In addition, the Court may take judicial notice of types and elements of works
21 that are common and prevalent in the jurisdiction of the Court, such as the common
22 elements of stories involving exorcisms and the prevalence of works incorporating
23 exorcisms and haunted twins. (See Facts Nos. 3-5, supra.) Indeed, in a copyright
24 infringement case involving claims of infringement against the producers of the
25 *Rachael Ray* television show, Judge Audrey Collins found it proper to judicially
26 notice "elements of a television show [that] are common and prevalent in public
27 works." Zella, 529 F. Supp. 2d at 1129 (court took judicial notice that a host, guest
28 celebrities, interviews and cooking segments are elements of a television show that are

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1 common and prevalent in public works). See also, Walker v. Time Life Films, Inc.,
 2 615 F. Supp. 430, 438 (S.D.N.Y. 1985) (taking judicial notice that “members of the
 3 New York Police Department are often portrayed as Irish, smokers, drinks, and third
 4 or fourth generation police officers”); Goldberg v. Cablevision Sys. Corp., 261 F.3d
 5 318, 328 (2d Cir. 2001) (court took judicial notice of the common practice for
 6 educational and ideological programs aired on television and radio to conclude with
 7 an offer of or directions for obtaining a transcript or duplicate tape of the program);
 8 Willis v. Home Box Office, 2001 WL 1352916, at *2 (S.D.N.Y.) (“It does not strain
 9 the concept of judicial notice to observe that books, movies and television series are
 10 full of such unethical men and women in a variety of businesses.”).

11 As to the specific works identified in Fact Nos. 4 and 5, the Court may take
 12 judicial notice of these generally known works and their contents. See, e.g.,
 13 Twentieth Century Fox Film Corp. v. Marvel Enter., Inc., 155 F. Supp. 2d 1, 41 n. 71
 14 (S.D.N.Y. 2001) (taking judicial notice of the film *Star Wars* pursuant to Rule
 15 201(b)(1) stating, “*Star Wars* is one of the most well-known and widely viewed
 16 science fiction films”); Sobhani v. @Radical Media, Inc., 257 F. Supp. 2d 1234, 1235
 17 n. 1 (C. D. Cal. 2003) (taking judicial notice of the “popular motion picture” *Cast*
 18 *Away* and commercials for Jack-in-the-Box pursuant to Rule 201(b)(1)); Gal v.
 19 Viacom Intern., Inc., 518 F. Supp. 2d 526, 546-47 (S.D.N.Y. 2007) (taking judicial
 20 notice of specific works cited by Defendants as featuring corporate greed in the
 21 pharmaceutical industry and centering around the development of miracle drugs);
 22 Wild, -- F. Supp. 2d --, 2011 WL 2182420, *1, 11, 17, n. 10 (referencing a number of
 23 works, including Ray Bradbury’s *Something Wicked This Way Comes*, the *Harry*
 24 *Potter* series, *Star Trek*, the *Lost* television series, and *Snow White*).
 25 ///
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 28 ///

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1 Since every item that is the subject of the instant Request for Judicial Notice is
2 either generally known within the jurisdiction or “capable of accurate and ready
3 determination by resort to sources whose accuracy cannot reasonably be questioned”
4 as required under Rule 201(b), the Court should grant Defendants’ Request for
5 Judicial Notice in its entirety.

6 Respectfully submitted,

7 Dated: July 11, 2011 KATTEN MUCHIN ROSENMAN LLP

8 Gail Migdal Title
9 Joel R. Weiner
Gloria C. Franke

10 By: /s/ Joel R. Weiner
11 Attorneys for defendants ROGUE PICTURES,
12 LLC, UNIVERSAL STUDIOS HOME
13 ENTERTAINMENT LLC, UNIVERSAL
14 STUDIOS HOME ENTERTAINMENT
15 PRODUCTIONS LLC, PLATINUM DUNES
16 PRODUCTIONS, PHANTOM FOUR FILMS,
DAVID S. GOYER and JESSIKA
BORSICZKY GOYER

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Case 2:10-cv-05650-DSF -AJW Document 29-4 Filed 07/11/11 Page 1 of 3 Page ID
#:280

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 17 FOUR FILMS, DAVID S. GOYER
 18 and JESSIKA BORSICZKY GOYER

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

19 DANIEL SEGAL, an individual,

) CASE NO. 2:10-cv-05650 DSF (AJWx)

20 Plaintiff,

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 21 vs.
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1 **TO PLAINTIFF AND HIS ATTORNEY OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 11, 2011, in conjunction with their
 3 electronically-filed Motion for Judgment on the Pleadings and Request for Judicial
 4 Notice in support thereof, defendants Rogue Pictures, Universal Studios Home
 5 Entertainment LLC, Universal Studios Home Entertainment Productions LLC,
 6 Platinum Dunes Productions, Phantom Four Films, David S. Goyer and Jessika
 7 Borsiczky Goyer (collectively, "Defendants") lodged the following physical exhibits
 8 with the Court:

9 Compendium of Works Referenced in Plaintiff's First Amended Complaint

10 1. DVD of the film *The Unborn*.
 11 2. Plaintiff's *Transfers*:
 12 a. A copy of the *Transfers* screenplay.
 13 b. A copy of the *Transfers* novel.

14 Compendium of Other Works Referenced in Defendants' Request for Judicial Notice

15 3. DVD copy of the 1973 film *The Exorcist*.
 16 4. DVD copy of the 2005 film *The Exorcism of Emily Rose*.
 17 5. DVD copy of the 1972 film *The Other*.

18 Respectfully submitted,

19 Dated: July 11, 2011 KATTEN MUCHIN ROSENMAN LLP
 20 Gail Migdal Title
 21 Joel R. Weiner
 22 Gloria C. Franke

23 By: /s/ Joel R. Weiner
 24 Attorneys for defendants ROGUE PICTURES,
 25 LLC, UNIVERSAL STUDIOS HOME
 26 ENTERTAINMENT LLC, UNIVERSAL
 27 STUDIOS HOME ENTERTAINMENT
 28 PRODUCTIONS LLC, PLATINUM DUNES
 PRODUCTIONS, PHANTOM FOUR FILMS,
 DAVID S. GOYER and JESSIKA
 BORSICZKY GOYER

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#:858

1 1 Joel R. Weiner (SBN 139446)
2 2 Gail Migdal Title (SBN 49023)
3 3 Gloria C. Franke (SBN 246390)
4 4 KATTEN MUCHIN ROSENMAN LLP
5 5 2029 Century Park East, Suite 2600
6 6 Los Angeles, CA 90067-3012
7 7 Telephone: 310.788.4400
8 8 Facsimile: 310.788.4471
9 9 joel.weiner@kattenlaw.com
10 10 gail.title@kattenlaw.com
11 11 gloria.franke@kattenlaw.com

7 | Attorneys for defendant
DAVID S. GOYER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION, LOS ANGELES

DANIEL SEGAL, an individual,) CASE NO. 2:10-cv-05650 DSF (AJWx)
vs.)
Plaintiff,)
vs.)
DAVID S. GOYER, an individual, and) **DECLARATION OF GAIL MIGDAL**
DOES 1-50, inclusive,) **TITLE IN SUPPORT OF**
Defendants.) **DEFENDANT'S OPPOSITION TO**
) **PLAINTIFF'S EX PARTE**
) **APPLICATION FOR LEAVE TO**
) **FILE A THIRD AMENDED**
) **COMPLAINT**

Katten

8029 Century Park East, Suite 2600
Los Angeles, CA 90067-1012
310.788.4400 tel 310.788.4471 fax

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1 **DECLARATION OF GAIL MIGDAL TITLE**

2 I, Gail Migdal Title, declare as follows:

3 1. I am an attorney at law duly licensed to practice before all the courts in
 4 the State of California and this United States District Court. I am a partner of the law
 5 firm of Katten Muchin Rosenman LLP, counsel of record for defendant David S.
 6 Goyer. I have personal knowledge of the facts set forth in this Declaration and, if
 7 called as a witness, could and would testify competently to such facts under oath.

8 2. Plaintiff Daniel Segal (“Plaintiff”) filed this case on July 29, 2010. On
 9 September 3, 2010, Plaintiff filed his First Amended Complaint (“FAC”). The FAC
 10 alleged that the motion picture *The Unborn* infringed Plaintiff’s copyright in his novel
 11 and screenplay *Transfers*. The defendants in the copyright action included the writer
 12 of the screenplay, David Goyer; and the producer of the motion picture, Rogue
 13 Pictures. The FAC also alleged a breach of implied contract claim against defendant
 14 Goyer only.

15 3. On July 11, 2011, having finally received a copy of the Plaintiff’s
 16 screenplay and expert report, defendant filed a Motion for Judgment on the Pleadings.
 17 In an order dated August 19, 2011 (“Order”), the Court granted defendant’s Motion
 18 for Judgment on Pleadings. The Court dismissed with prejudice Plaintiff’s claim for
 19 copyright infringement against all defendants. The Court dismissed Plaintiff’s
 20 remaining claim against Goyer for breach of implied contract with leave to amend “if
 21 he can do so in compliance with Rule 11.”

22 4. Plaintiff’s breach of implied contract claim was based on an alleged
 23 submission of his work in January 2007 (albeit to an unrelated third party Gloria Fan,
 24 an executive at non-party Mosaic Media). Accordingly, even prior to the hearing on
 25 defendant’s Motion for Judgment on the Pleadings, this firm produced to Plaintiff’s
 26 counsel documents, including emails from Goyer, establishing that the central
 27 elements of *The Unborn* had been created prior to Plaintiff’s purported submission,
 28 and requested that Plaintiff voluntarily dismiss his claims. Specifically, those

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1 documents included an email dated August 10, 2006 setting forth certain central
 2 elements of *The Unborn* and an email dated December 13, 2006 from Goyer to his
 3 assistant attaching a 24-page outline for *The Unborn*. Following receipt of the Court's
 4 Order, I renewed our efforts to persuade Plaintiff's counsel to dismiss the action based
 5 on, among other things, the independent creation evidenced by Goyer's emails.

6 5. Unfortunately, Plaintiff's counsel refused to accept the authenticity of
 7 Goyer's emails. On September 27, 2011, Plaintiff filed a Second Amended
 8 Complaint. Accordingly, in an effort to dispose of this matter without undue
 9 expenditure of the Court's and counsel's resources, Goyer permitted Plaintiff's
 10 computer expert to come to his home and examine his computer and the emails at
 11 issue to confirm that, in fact, the dates thereon were authentic. The examination was
 12 conducted on October 19, 2011. Gloria Franke, an associate at this firm working on
 13 this matter, observed the examination.

14 6. Based on the computer expert's confirmation of the authenticity of the
 15 emails and the dates thereon, Plaintiff's counsel filed a Request for Dismissal without
 16 prejudice on October 27, 2011. On October 27, 2011, this firm filed a request that the
 17 dismissal be with prejudice in light of all the foregoing facts. On November 7, 2011,
 18 this Court issued the following order denying both requests for dismissal: "As
 19 defendant has objected to the request for dismissal without prejudice, the request is
 20 denied. If no new request is submitted by November 16, the pretrial and trial dates are
 21 reinstated."

22 7. Counsel for Plaintiff and for Goyer thereafter entered into discussions in
 23 an attempt to agree on the nature of the dismissal, i.e., with or without prejudice. At
 24 no time did our discussion preclude Plaintiff's counsel from filing any pleading before
 25 this Court, including a motion for leave to file a third amended complaint.

26 8. Plaintiff's counsel bases his proposed Third Amended Complaint on the
 27 allegation that Plaintiff purportedly submitted his work to Relativity Management in
 28 2005 and that Rogue Pictures, the producer of *The Unborn*, is an affiliate of

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1 Relativity Media. However, at the time Rogue Pictures produced *The Unborn*, it was
2 a division of Focus Features, an affiliate of Universal Pictures with no relationship to
3 Relativity Media. The acquisition of Rogue Pictures by Relativity Media was
4 completed in late December 2008 and announced on January 4, 2009. *The Unborn*
5 was released on January 9, 2009. Attached hereto as Exhibit A is a copy of a business
6 record from Rogue Pictures reflecting that principal photography on *The Unborn* was
7 completed on May 2, 2008, and that the picture was delivered on November 14, 2008.
8 Attached hereto as Exhibit B is a copy of a New York Times article and a press
9 release issued by Relativity Media, both dated January 4, 2009, regarding the
10 acquisition of Rogue Pictures by Relativity Media.

11 9. Thus, apart from the fact that, as the Court has already found, the works
12 at issue are not substantially similar as a matter of law, there is no facial plausibility
13 that any submission to Relativity Management in 2005 could be the basis of a breach
14 of implied contract in connection with *The Unborn*, as it was produced by Rogue
15 Pictures before Rogue Pictures was acquired by Relativity Media. Indeed, I explained
16 the foregoing to Plaintiff's counsel, orally and in writing, well before he made the
17 pending *ex parte* application.

18 I declare under penalty of perjury under the laws of the United States of
19 America that the foregoing is true and correct and that this was executed in Los
20 Angeles, California on November 30, 2011.

/s/Gail Migdal Title

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EXHIBIT A

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THE UNBORN

POST PRODUCTION SCHEDULE V 2.0 - 23 WEEKS - (8/11/08)

Principal Photography	3/3/08	to	5/2/08
Post Production	5/5/08	to	10/10/08
Delivery	10/13/08	to	11/14/08
Release			tbd

DIRECTOR'S CUT SCREENING		7/22/08
F&F SCREENING #1		7/28/08
F&F SCREENING #2		8/11/08
LOCK PICTURE FOR PREVIEW #1		8/12/08
NRG PREVIEW #1		8/20/08
LOCK PICTURE		8/29/08
MPAA		9/4/08
DI COLOR GRADING (8 DAYS)	9/15/08	to 9/24/08
SCORE RECORD	9/18/08	to 9/22/08
FX / FOLEY PRE-DUBB (7 DAYS)	9/18/08	to 9/26/08
DIALOGUE / ADR PRE-DUBB (7 DAYS)	9/18/08	to 9/26/08
FINAL DUBB (9 DAYS)	9/29/08	to 10/9/08
STEM SCREENING		10/7/08
PRINTMASTER SR/SRD/DTS		10/10/08
M&Es		10/14/08
FINAL DI COLOR GRADING (2 DAYS)	10/13/08	to 10/14/08
I.P. #1		10/28/08
I.N. #1		10/30/08
REL. PRINTS AVAILABLE		11/14/08

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EXHIBIT B

Universal Sells Rogue Pictures for \$150 Million - NYTimes.com
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Universal Sells Rogue for \$150 Million

By MICHAEL CIEPLY
 Published: January 4, 2009

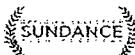
LOS ANGELES — In a deal that signifies further reordering in Hollywood's specialty movie business, the Universal Pictures unit of General Electric completed its sale of Rogue Pictures, a maker and distributor of lower-cost films, to Relativity Media for about \$150 million.

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The deal closed quietly just before Christmas and was disclosed by the companies on Sunday.



The transaction pointed toward G.E.'s willingness to bolster profit with help from an asset sale. It also signals the continued viability of Relativity, a private production and financing company, which has been in a dispute with one of its major lenders.

It was a welcome sign of health in the independent film business, or at least the part that trades heavily in audience-pleasing action and horror films.

Rogue was a division of Focus Features of Universal. Universal is a unit of NBC Universal, which is 80 percent owned by G.E. The balance is owned by the French company Vivendi.

Rogue had success in distributing films like "The Strangers," a thriller that had \$52.6 million in domestic ticket sales last year, and "Balls of Fury," an action comedy that took in \$32.9 million at the box office in 2007. But NBC Universal sold the operation as G.E. pressured all of its business units to enhance profitability.

It remains unclear if G.E. will take another step in revamping its entertainment business, though speculation has been widespread that the conglomerate might try something as aggressive as a spinoff of its movie and television operations over the next year. The Rogue sale allows the studio to profit from the continued distribution of the unit's movies without the cost of investing in their production and development.

Relativity and Citigroup Global Markets, its major lender, were involved in lawsuits over the terms of loans that support the financier's investment in films for Hollywood studios.

Relativity has been a major backer of films for Universal, Sony and others. The company has agreed to provide about \$3 billion in financing for Universal films through 2015 and has already contributed to recent releases, including "Frost/Nixon" and "Role Models."

"It doesn't actually change the character of our company. It just further expands the

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Universal Sells Rogue Pictures for \$150 Million - NYTimes.com
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business plan," Ryan Kavanaugh, Relativity's chief executive, said Sunday. Mr. Kavanaugh said he expected Rogue to produce a wider range of supernatural horror and other films than it had made under Universal, which occasionally restricted the unit's offerings to keep it from competing with the main studio operation.

Kori Bernards, a spokeswoman for Universal, declined to elaborate on the terms of the sale.

With Rogue, Relativity acquires a library of about 25 films, along with about 30 development projects and a valuable distribution arrangement with Universal. Rogue also has a producing deal with Wes Craven, a prolific maker of horror films whose next picture for the studio is "25/8," a serial killer thriller scheduled for release this year.

The independent film business had a huge shakeout last year after Time Warner closed its Warner Independent and Picturehouse units and severely cut back New Line Cinema. In addition, Viacom shrank the Paramount Vantage operation of Paramount Pictures.

Still, companies like Lionsgate and Sony Pictures' Screen Gems unit — which have focused on lower-cost films that appeal to fans of horror, action and other reliable genres — have remained relatively robust.

Rogue's next planned release is "Unborn," a thriller about people pursued by a horrific curse, which was written and directed by David S. Goyer and is set to open Friday.

A version of this article appeared in print on January 5, 2009, on page
 B5 of the New York edition.

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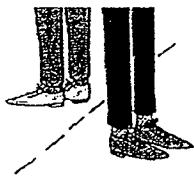
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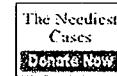
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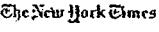


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NEWS

RELATIVITY MEDIA BUYS ROGUE PICTURES

01.04.2009

Relativity Media, LLC has purchased Rogue Pictures from Universal Pictures, CEO Ryan Kavanaugh announced today. With this deal, Relativity has acquired Rogue's entire library, its more than 30 projects in development and ownership of its producing deals, including the legendary horror mastermind, Wes Craven and Intrepid.

The first picture set for release under this new deal is writer/director David S. Goyer's (The Dark Knight) new horror film, *The Unborn*, produced by Michael Bay and his Platinum Dunes production company. *The Unborn* is a supernatural thriller that follows Casey (Odette Yustman) a young woman pulled into a world of nightmares when a demonic spirit haunts her and threatens everyone she loves. Plagued by merciless dreams and a tortured ghost that haunts her waking hours, Casey learns that the spirit may be the soul of her unborn twin brother and must turn to the only person who can make it stop-- Rabbi Sendak (Gary Oldman). *The Unborn* opens January 9, 2009.

Relativity expects to release three additional pictures in 2009, including Craven's thriller *25/8*, and release a minimum of two films per year each year thereafter. Relativity's President of Production Tucker Tooley and his team will oversee all future productions. As part of the deal Universal will continue to handle distribution of Rogue Pictures for most of the world. Today's announcement comes on the heels of Relativity's landmark equity partnership with Universal (announced earlier this fall) where Relativity will fund a substantial part of Universal's upcoming slate until 2015.

"Rogue is a recognized brand worldwide," said Kavanaugh. "They've had success in the horror space in particular, which is something we can expand upon. This purchase allows us to pair our production and finance abilities alongside Universal's extraordinary marketing and distribution team, under the umbrella of a strong and highly-focused brand."

Said Michael Joe, Executive Vice President of Universal Pictures, "'Relativity is acquiring a strong, profitable business, and we are pleased to be working with them to continue marketing and distributing Rogue films. We know Ryan and his team will continue to ensure Rogue has an opportunity to flourish."

Founded in 2004 by David Linde and James Schamus, Rogue Pictures is devoted to producing high-quality suspense, action, thriller, comedy and urban entertainment with mainstream appeal and franchise potential. Past hits include: *Strangers*, *Waist Deep*, *The Hitcher*, *Balls of Fury*, *Dave Chapelle's Block Party*, *Unleashed*, *Doomsday*, *Fearless*, *Assault on Precinct 13*.

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)
SS

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Katten Muchin Rosenman, 2029 Century Park East, Suite 2600, Los Angeles, CA 90067-3012. On November 28, 2012, I served the within documents:

SUPPLEMENTAL EXCERPTS OF RECORD

BY HAND DELIVERY/PERSONAL SERVICE – I caused said document(s) to be personally served to the addressee listed below.

10
11 **X** BY U.S. MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, addressed as set forth below.

12 By **OVERNIGHT COURIER**, I caused the above-referenced document(s) to be
13 delivered to an overnight courier service (Overnite Express), for delivery to the below
address.

**Steven T. Lowe, Esq.
Lowe Law, a Professional Corporation
11400 Olympic Blvd., Suite 640
Los Angeles, CA 90064**

**Office of the Clerk
James R. Browning Courthouse
U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939**

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19 I am readily familiar with the firm's practice of collection and processing correspondence
for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
20 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal cancellation date or postage
21 meter date is more than one day after the date of deposit for mailing in affidavit.

22 I declare that I am employed in the office of a member of the bar of this court whose direction the service was made.

Executed on November 28, 2012, at Los Angeles, California.

Kathy Cornejo
KATHY CORNEJO